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No. 95 - 2024

In The
Supreme Court of the United States
October Term, 1995

C. Martin Lawyer, III,

Appellant,

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, *et. al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Florida

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BRIEF OPPOSING MOTIONS TO AFFIRM

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QUESTIONS PRESENTED

A. **Whether the District Court's "limited review" of Plan 386 constituted a failure to conduct the legal analysis required by Miller.**

B. **Whether the mediation process ordered by the District Court violated federalism by usurping the legislative process and representative state government in Florida.**

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A. THE DISTRICT COURT'S "LIMITED REVIEW" OF PLAN 386 CONSTITUTED A FAILURE TO CONDUCT THE LEGAL ANALYSIS REQUIRED BY MILLER

Appellees argue that the District Court's order is insulated by the "clearly erroneous" standard of review. However, this Court has stated that "independent appellate review entails a careful consideration of the district court's legal analysis" and such review "does not admit of unreflective reliance on a lower court's inarticulable intuitions." *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190, 198-199 (1991). This Court has also held that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948). Moreover, when a District Court bases its conclusion upon a mistaken impression of the applicable legal principles this Court is not bound by the clearly erroneous standard. *Inwood Labs v. Ives Labs*, 102 S.Ct. 2182, 2189 n. 15 (1982).

In the instant case the District Court's conclusions were based on a mistaken impression of the principles, analysis and burdens of proof required by this Court in *Miller v. Johnson*, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) as well as the principles of federalism (discussed in Point B, *infra.)*.

The District Court's mere quotation of language from *Miller* does not constitute a proper application of the *Miller* standard. The District Court, itself, stated that it had conducted only a "limited review of Plan 386" J.S. App. A, 17a. Ultimately, the District Court's conclusion that "Plan 386 is racially less recognizable and distinctive than present District 21," J.S. App. A, 16a, clearly reflects an inadequate legal analysis under the *Miller* standard.

The District Court completely failed to address the statistics presented by Appellant which demonstrated that Plan 386 still boosted the Black V.A.P. from 8% to 36.2%. District 21 had a Black V.A.P. of 45%. Guthrie Decl. Tab 2 (R.188). Huge

concentrations of black voters were deliberately placed within the district. Appellant has discussed this point extensively. See, J.S., 23 and J.S App. B, 23a.

The only "evidence" of "community of interest" came from the affidavit of state bureaucrat Guthrie who offered race-neutral explanations which would apply to any district in the United States (i.e., concern about AIDS and economic development). This was obviously pretextual and inadequate under *Miller*. Even the District Court did not rely on these self-serving declarations in support of its decision. Instead, the District Court submitted Plan 386 to a referendum at the "fairness hearing" and concluded that the absence of objections signaled that the residents of District 21 "regarded themselves" as a "community" and had given their "presumptive consent" to the plan. J.S. App. A, 16a-17a.

The full extent of the bizarre shape of the district cannot be appreciated by the map of Plan 386 utilized by the District Court (J.S. App. E) because, incredibly, that map does not even depict the coastline and therefore the extent to which the plan violated traditional districting principles. However J.S. App. F does depict the actual district. Reality was one of the casualties of this mediated settlement.

As this Court stated in *Shaw v. Hunt*, 116 S.Ct. 1894, 135 L. Ed. 2d 207, 225 (1996) with respect to another district, no one looking at Plan 386 (J.S. App. F) could reasonably suggest that the district contains a "geographically compact" population of any race especially when it is compared to surrounding districts.

As in *Bush v. Vera*, 116 S.Ct. 1941, 135 L.Ed.2d 248, 270 (1996), the district "reaches out to grab small apparently isolated communities which ...could not possibly form part of a compact majority-minority district and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race...." *Id.* at 267.

In light of the above evidence, it is clear that the District Court had a mistaken impression of the *Miller* standard and

conducted only a limited and inadequate review of Plan 386. There is no doubt that based on the entire evidence, the District Court committed error in concluding that Plan 386 was constitutional.

Obviously, the District Court failed to articulate a compelling interest to justify the drawing of the district as required by *Miller*. Nor did the District Court find that the district was narrowly tailored to achieve a compelling interest.

By reason of the foregoing the order must be reversed.

B. THE MEDIATION PROCESS ORDERED BY THE DISTRICT COURT VIOLATED FEDERALISM BY USURPING THE LEGISLATIVE PROCESS AND REPRESENTATIVE STATE GOVERNMENT IN FLORIDA

Contrary to Appellees' argument, Appellant indeed has standing to raise the federalism issue. He is a voter in the district and was injured by the District Court's order. Therefore, he has standing. Indeed, he is the only individual with any standing whatsoever in this lawsuit or in this appeal. *See*, J.S. 2-3; *United States v. Hays*, 132 L.Ed .2d 635, 643 (1995).

The District Court itself stated that Appellant had demanded an adjudication that District 21 was unconstitutional. J.S. App. A, 8a. Appellant objected to the District Court's failure to defer to the State of Florida. J.S., 20. Although Appellant did not specifically ground his objection in terms of federalism, none of the Appellees dispute that this issue is one which seriously affects the fairness, integrity, or public reputation of public proceedings.

In *Reynolds v. Sims*, 377 U.S. 533, 585-586 (1964) this Court held that when a federal court has invalidated a state's apportionment plan, the court should "act with proper judicial restraint." In the case at bar, with the 1996 elections over one year away, on July 14, 1995 the District Court ordered that the case be mediated because the parties had announced to the court that "they anticipated no spontaneous effort by the State of Florida to alter

District 21 in response to *Miller*. " J.S. APP. A, 5a. However, no court had declared District 21 unconstitutional under *Miller*. The mere fact that the legislature had not spontaneously reapportioned the District in response to *Miller* did not justify the judicial commandeering of Florida's legislative process.

Instead of giving the legislature a reasonable opportunity to devise and submit a replacement plan, the District Court allowed the lawyers for the litigants to devise a replacement plan in the context of a mediated settlement.

Contrary to the Appellees' arguments, this is not merely academic or irrelevant. It is of serious consequence to Appellant. The manner in which the District Court proceeded is part and parcel of the ultimate decision of the District Court. Indeed, the use of mediation short-circuited state legislative debate and voting on a replacement plan and thus precluded direct evidence of motivation as envisioned by this court in *Miller*. In *Miller v. Johnson*, 132 L.Ed. 2d at 780 this Court made clear that the motivation of the state legislature is a source of direct evidence. The state legislative process reveals legislative intent. In the absence of a legislative process, the motivation of a legislative body cannot be determined. Thus, any procedure adopted by a federal court which would preclude legislative intent from being generated and ascertained is fatally flawed.

The Appellees argue that the issue of the District Court's failure to adjudicate District 21 unconstitutional is irrelevant. However, the District Court apparently believed that its decision to mediate the case obviated the necessity of adjudicating the constitutionality of District 21. The result was a preemptive mediation which foreclosed giving the Florida legislature an opportunity to devise and submit a replacement plan as would have been the case had there been an adjudication. Clearly, the District Court's decision to mediate this case rather than defer to the Florida legislature was inextricably intertwined with the decision not to adjudicate the constitutionality of the plan. This question is clearly before this Court and is subsumed in the Questions Presented herein.

The Appellant complains about the failure to adjudicate the constitutionality of District 21 insofar as it foreclosed an adequate opportunity for the Florida legislature as an institution to devise a replacement plan. Most importantly, however, the failure to adjudicate the constitutionality of District 21 resulted in an inadequate "limited review " of Plan 386 by the District Court.

Contrary to Appellees' arguments, the mediation process is indeed confidential and the assertion that appellant could have examined the mediator at the fairness hearing is contradicted by the Local Rule 9.07(b) of the United States District Court for the Middle District of Florida (Appendix A) which specifically provides as follows:

> "all proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest." (Appendix A).

This puts to rest the Appellees' argument that the Appellant had a full and fair opportunity to put on his case at a "fairness hearing" on a consent decree which lacked the consent of the only plaintiff that had standing. *United States v. Hays*, 132 L.Ed.2d 635, 643 (1995). The other plaintiffs who have now aligned themselves with the defendant-intervenors (including incumbent Senator Hargrett) reside outside of the district challenged by the complaint.

The Appellees also incorrectly state that "only" the Appellant objected to the mediation process which supplanted the legislative process. Indeed, Florida Senator Howard C. Forman took the extraordinary step of writing a letter directly to Judge Tjoflat on September 21, 1995. Appendix B. In that letter State Senator Forman advised Judge Tjoflat that "the Florida Senate has not agreed to any proposed settlement" and that "as a constitutionally established collegial body, the Florida Senate can agree to nothing without open debate and action by the entire body." Appendix B.

Senator Forman continued as follows:

> As a duly elected Member of the Florida Senate, I have never waived my constitutional duty and responsibility to participate in all Senate matters. And, under no circumstances does any individual Senator, or group of individual Senators, have the right to agree to anything in my name...I challenge any representation that the Florida Senate has agreed to any proposed settlement in this case. Appendix B.

This letter confirms the accuracy of this Court's observation that states have "guarded their sovereign districting prerogatives jealously" and that the federal courts have a "customary and appropriate backstop role." *Bush, supra*, 135 L.Ed.2d at 273. It also underscores the dictates of this Court that in such matters a federal court must minimize friction between its remedies and legitimate state policies. *Connor v. Finch*, 431 U.S. 407, 414 (1977).

The Appellees further argue that the District Court's order was only temporary and that the Florida legislature was not precluded from enacting subsequent apportionment legislation. However, regardless of the language of any settlement agreement, the order of the District Court contains no such limiting language and it clearly "modified and redistricted" District 21 "effective immediately." J.S. App. A, 18a.

This Court has stated that the "Constitution divides authority between federal and state government for the protection of individuals. State sovereignty is not just an end in itself: 'Rather federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120, 154 (1992) citing *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

Just as this Court held in *New York* that state officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution, neither can state officials consent to

the judicial usurpation of state legislative prerogative and state sovereignty which contravenes established principles of federalism.

Appellant is clearly entitled to appellate review of that aspect of the District Court's order which violated Appellant's individual right to state representative government under the Tenth Amendment. A federal court is itself bound to uphold the Constitution. 28 U.S.C. Section 453. In the process of adjudicating a voting rights case a federal court cannot eviscerate the individual rights of the Appellant to representative state government.

Just as the shortage of sites for radioactive waste was a pressing problem in the *New York* case, so is the problem of voting rights for minorities in Florida and other states. However, as this Court stated in *New York*, "a judiciary which licenses extra-constitutional government with each issue of comparable gravity, in the long run, would be far worse." *New York, supra*, 120 L.Ed .2d at 158.

This case is unprecedented. None of the 20 lawyers representing the Appellees have cited a single case authorizing the procedure adopted by the District Court or the "limited review" it conducted. Taken to its logical extreme, district courts across the country could preempt sovereign state prerogatives in apportionment cases by routinely ordering mediation. Adjudication would be supplanted by mediation; state legislators and state legislatures would be replaced by lawyers for litigants.

For the reasons discussed in Point A above, Plan 386 clearly violates the Equal Protection Clause regardless of the process utilized by the District Court. Appellant has raised the federalism issue because it is a matter of grave importance. When privileged mediation sessions replace the state legislative process, democracy is in jeopardy. This Court should reverse on this point in order to discourage the use of mediation when the effect is to usurp the state legislative process and to potentially mask the intent of those who formulate district plans.

CONCLUSION

For the foregoing reasons this Court should reverse the Final Order of the District Court.

Respectfully submitted,

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C. Martin Lawyer, III, *Appellant*
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August 27, 1996

APPENDIX A

THE FLORIDA SENATE
Tallahassee, Florida 32399-1100

SENATOR HOWARD C. FORMAN
32nd District

COMMITTEES:
Health Care,
Vice Chairman
Health and Rehabilitative Services
Regulated Industries
Transportation
Ways and Means,
Sub. C. (Human Services)

JOINT COMMITTEE:
Legislative Auditing

September 21, 1995

The Hon. Gerald B. Tjoflat, Chief Judge
11th United States Circuit Court
311 W. Monroe Street, Suite 444
P.O. Box 960
Jacksonville, FL 32201-0960

Dear Judge Tjoflat:

I have been advised that mediation has been conducted on Scott, et al v. the State of Florida, et al and that the Florida Senate is purported to have agreed to the proposed settlement.

This letter is intended to communicate to you in the strongest possible terms that the Florida Senate has not agreed to any proposed settlement. As a constitutionally established collegial body, the Florida Senate can agree to nothing without open debate and action by the entire body. As a

duly elected Member of the Florida Senate, I have never waived my constitutional duty and responsibility to participate in all Senate matters. And, under no circumstances does any individual Senator, or group of individual Senators, have the right to agree to anything in my name. Unlike the Florida House of Representatives, which has adopted a rule authorizing the Speaker to conduct such negotiations, the Rules of the Florida Senate require a collegial decision on all such matters.

Therefore, I challenge any representation that the Florida Senate has agreed to any proposed settlement in this case.

Sincerely,

/s/_____
Howard Forman
District 32

APPENDIX B

RULE 9.07 TRIAL UPON IMPASSE

a) Trial Upon Impasse. If the mediation conference ends in an impasse, the case will be tried as originally scheduled.

b) Restrictions on the Use of Information Derived During the Mediation Conference. All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the conference, unless a settlement is reached.
Added effective Nov. 15, 1989.